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IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

No. 107

KINGSLEY BOOKS, INC., LOUIS FINKELSTEIN, doing business as TIMES SQUARE BOOK SHOP, and MARTIN KLEINBERG,

Appellants,

against

PETER CAMPBELL BROWN, Corporation Counsel of the City of New York,

Appellee.

ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

APPELLEE'S BRIEF.

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ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

APPELLEE'S BRIEF

Preliminary Statement

The above-named appellants—defendants in the action—have appealed from a judgment of the Court of Appeals of the State of New York, entered April 27, 1956, which

* Of original defendants other than those here named, Metropolitan Book Shop, Inc. and Philip Pellegrino did not appear although served with process; Anne Goldberg was not served with process and was deceased at the time of the trial; and Publishers Outlet and Gordon Law were not served with process (R. 73-74n.)

** The action was originally instituted in the name of Adrian P. Burke, the then Corporation Counsel. On his resignation to accept the office of Judge of the New York Court of Appeals, his successor, Peter Campbell Brown, was substituted as plaintiff (R. 73n).

unanimously affirmed a judgment entered on a decision in favor of the plaintiff—the instant appellee—rendered after a trial without a jury before Mr. Justice MATTHEW M. LEVY at a Special Term of the New York Supreme Court, New York County.

The judgment (R. 12-15) entered on the decision of Special Term enjoined the defendants from distributing, selling or acquiring possession of volumes 1-14 of a publication entitled "Nights of Horror" and directed that copies of such volumes in the possession of the defendants be turned over to the City Sheriff of the City of New York for destruction.

The Court refused, on prior restraint grounds (Opinion, R. 67, 69-70), to enjoin the sale and distribution of *future* issues of "Nights of Horror." Since the plaintiff did not appeal from the judgment, this determination is not before the Court for review. It may be noted also that although the evidence (see R. 21, 96) indicates that volumes 15 and 16 of "Nights of Horror" were offered for sale along with volumes 1-14, the complaint (R. 3) is restricted to volumes 1-14, as is the judgment (R. 13-14) in the action. The failure to include volumes 15 and 16 is not a factor in the appeal since no point is made in connection therewith.

The statute pursuant to which the action was prosecuted is § 22-a of the New York Code of Criminal Procedure (New York Laws 1941, chap. 925, as amended by Laws 1954, chap. 702). A copy of the statute is set forth in an Appendix hereof (*post*, pp. 20-21).

The judgment entered on the decision of Special Term was taken on direct appeal to the New York Court of Appeals pursuant to § 588, subd. 4, of the New York Civil Practice Act (set forth *post*, p. 21), which permits such direct appeal "where the only question involved on the appeal is the validity of a statutory provision of the state or of the United States under the constitution of the state or of the United States," and which provides that

"on any such appeal only the constitutional question shall be considered and determined by the court."

The opinion, constituting also the decision, of the Special Term, is reported in 208 Misc. 150 and is also to be found at pages 44-74 of the Record. The New York Court of Appeals, while unanimous in its affirmance of the judgment entered on the decision of Special Term, handed down two separate opinions; one, written by Judge Fuld and concurred in by Judges Dye and Van Voorhis; the other, written by Judge Desmond and concurred in by Chief Judge Conway and Judge Froessel. (Judge Burke took no part in the case.) The two opinions are reported in 1 N. Y. 2d 177, and are also be found at pages 79-91 of the Record.

Probable jurisdiction was noted in the instant case on January 14, 1957, and it, together with *Alberts* v. *State of California* (No. 61), was consolidated for argument with *Roth* v. *United States* (No. 582).

Statute Involved

Section 22-a of the New York Code of Criminal Procedure is set out in full in an Appendix hereof (*post*, pp. 20-21). Its provisions are summarized by Judge Fuld (Opinion, R. 79-80) in these words:

> "Enacted in 1941 (L. 1941, ch. 925) and amended in 1954 (L. 1954, ch. 702), section 22-a of the Code of Criminal Procedure was designed to supplement existing criminal sanctions by providing an additional civil remedy in the Supreme Court, by way of an action for an injunction, against the sale and distribution of written or printed matter found, after trial, to be obscene. Modeled on the language of section 1141 of the [New York] Penal Law, the statute prohibiting the sale and distribution of items obscene, section 22-a, insofar as here pertinent, embraces 'any book, magazine, pamphlet, comic book, story paper, writing, paper, picture, drawing, photograph, figure,

image or any written or printed matter of an indecent character, which is obscene, lewd, lascivious, filthy, indecent or disgusting.' It vests the right to maintain the action in the chief executive or legal officer of any city, town or village and provides that it may be brought against anyone who 'sells or distributes or is about to sell or distribute or has in his possession with intent to sell or distribute or is about to acquire possession with intent to sell or distribute' any such matter (subd. 1). If an injunction is granted, the statute continues, the resulting order or judgment must direct the defendant to 'surrender' the offending matter to the sheriff who 'shall be directed to seize and destroy the same' (subd. 3)."

The Pleadings

(1)

The action was commenced against the appellants on September 10, 1954. The complaint alleged that the plaintiff was the Corporation Counsel of the City of New York and that § 22-a of the New York Code of Criminal Procedure empowered him to maintain an action for an injunction against any person who sells or distributes, or is about to sell or distribute, written or printed matter of an indecent character or which is obscene, lewd, lascivious, filthy, indecent or disgusting (R. 7).

Upon information and belief, each of the defendants was alleged to be a person, firm or corporation which sells, or is about to sell, or has in his possession with intent to sell, or distributes, or is about to distribute a publication entitled "Nights of Horror." All of the issues of such publication were alleged to be obscene, lewd, lascivious, filthy and disgusting and in violation of law. Issues 1-14 of "Nights of Horror" were annexed to the complaint as exhibits.* The relief requested was a judg-

* They were also admitted in evidence as Plaintiff's Exhibits 1-1M (R. 22-23); see also footnote to p. 6 *post*.

ment (1) enjoining the defendants from acquiring, distributing, or selling any issues of "Nights of Horror," and (2) directing the defendants to surrender to the Sheriff any issues of such publication within their control, and (3) directing the Sheriff to seize and destroy the same.

(2)

The defendants Kingsley Books, Inc., Martin Kleinberg, and Louis Finkelstein—the instant appellants—submitted an answer (R. 10-11) which, as subsequently amended at the trial (R. 17), admitted that they had in their possession for sale or distribution issues of "Nights of Horror."

The answer denied the allegations of the complaint that such issues were obscene, lewd, lascivious, filthy, indecent and disgusting (R. 10). As affirmative defenses the answer asserted that §22-a of the Code of Criminal Procedure is unconstitutional and that the Charter of the City of New York precludes the plaintiff from bringing the action. This latter defense was withdrawn on the trial by the defendants Kingsley Books, Inc. and Martin Kleinberg (R. 41). No point was made in this regard in appellants' brief to the New York Court of Appeals nor is it made here.

The Evidence

Francis X. Cain, a detective in the New York City Police Department, called as a witness for the plaintiff, testified that on August 23, 1954, he visited the premises occupied by defendant Kingsley Books, Inc., on the ground floor at 220 West 42nd Street in the City of New York. (R. 19). Volumes 1 to 16 of "Nights of Horror" were on display; between 10 and 25 copies of each volume were on hand, the copies of each volume being kept in a separate stack (R. 21).

Cain purchased copies of volumes 2, 5 and 7 of "Nights of Horror" and paid $6 for them to an unidentified person, who he subsequently learned was the defendant Martin Kleinberg (R. 21-22). On August 25, 1954, he returned to the premises and purchased copies of volumes 3 and 4, paying $4 for them. Martin Kleinberg was present on the second occasion but he was not the person to whom the money was paid (R. 22).

Volumes 1 to 14 of "Nights of Horror," which were identified by the witness as having been on display at the premises on both August 23 and 25, were received in evidence without objection (R. 22-23; Pltff's. Exhs. 1-1M, not printed*).

On September 10, 1954, Cain returned to the premises of Kingsley Books, Inc., accompanied by another police officer, and served upon Kingsley Books, Inc., the summons and complaint in the action, together with an order of Mr. Justice Edgar J. Nathan, Jr., of the New York Supreme Court, dated September 10, 1954, requiring the defendants in the action to show cause at a Special Term of the Supreme Court on September 14, 1954, why an order should not be made in the action enjoining the defendants *pendente lite* from sale and distribution of the publications referred to in the complaint.**

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* These exhibits, as well as the inventories hereinafter referred to (Pltff's Exhs. 2, 3, 4 and 5), were omitted from the Record on a stipulation (R. 43), which further provides that the Exhibits may be handed up to the Court upon argument of the appeal. It would appear from the Record (R. 28-30) that the volumes of "Nights of Horror" were printed by the Pilgrim Press, operated by one Eugene J. Maletta. He was not a party to the action.

** An order containing an injunction *pendente lite* was made on September 22, 1954 by Mr. Justice William C. Hecht of the New York Supreme Court "upon consent of the attorney appearing for the parties at that time" (R. 39). Although it was stipulated that this order and the order to show cause "be deemed a part of the record of this trial" (R. 39), neither paper is included in the Record before this Court.

The order to show cause contained provisions enjoining the defendants from sale and distribution of the publications pending the hearing and determination of the motion for an injunction *pendente lite* and directing that an inventory be taken of the copies of the publications in question in the possession and control of the defendants. Pursuant to the order to show cause, the witness did take such inventory, which listed approximately 2,650 copies of various volumes of "Nights of Horrow" (R. 24-25; Pltff's Exh. 2).

Detective Cain further testified that on August 17, 1954, he visited the premises occupied by the defendant Metropolitan Book Shop, Inc.,* on the ground floor of 1133 Sixth Avenue in the City of New York (R. 25-26). About five or six volumes of "Nights of Horror" were on sale. He purchased copies of volumes 9, 11 and 14 and paid $9.27 for them. On August 18, 1954, he went back to the same place and purchased copies of volumes 12 and 13 for $6.18 (R. 26-27). On September 10, 1954, he returned to the premises and, pursuant to the order to show cause, made an inventory of "Nights of Horror," listing 31 copies of various volumes (R. 27-28; Pltff's Exh. 3).

James Rushin, also a detective in the New York City Police Department, testified that on September 9, 1954, he visited the Times Square Book Shop, located at 225 West 42d Street in the City of New York. Sixteen different issues of "Nights of Horror" were on display, about 40 or 45 copies in all. He bought one copy for $2 (R. 31-32). On September 10, he returned and, pursuant to the order to show cause, took an inventory which listed 234 copies of "Nights of Horror" (R. 33; Pltf's Exh. 4).

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* This defendant is not a party to the instant appeal. See footnote to p. 1, *supra*.

James J. McCarthy, also a detective in the New York City Police Department, testified that on September 9, 1954, he went to the Pelley Book Shop on the street level at 790 Eighth Avenue in the City of New York. Volumes 1 to 12 of "Nights of Horror" were on display and he bought one for $4. While he was there, Philip Pellegrino, one of the defendants,* came in and identified himself as the owner of the shop (R. 34-35). On September 10, 1954, he returned to the shop and, pursuant to the order to show cause, made an inventory listing 16 copies of "Nights of Horror" (R. 35-36; Pltff's Exh. 5).

It was conceded that the Times Square section of the City of New York, in which are located all the book shops as to which the witnesses testified, is a high traffic area, attracting persons of all ages and visitors from out of town (R. 37-38).

Since the publications in question are plainly and undisputedly obscene, we see no reason to recite their contents. We respectfully refer the Court to the opinion of Mr. Justice Levy with respect to this aspect of the case (see Opinion, particularly at R. 53-54).

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* This defendant is not a party to the instant appeal. See footnote to p. 1, *supra*.

ARGUMENT

The constitutionality of § 22-a of the New York Code of Criminal Procedure should be upheld on this appeal since:

(a) The appellants do not question the definiteness of the statutory standard laid down by the statute in respect to obscene publications;

(b) The appellants concede that the books they sold and held for sale are in fact obscene;

(c) The statute does not involve a prior restraint on publication but only the infliction of penalties after publication, with appropriate procedural protection for those sued under it; and

(d) Even if there were some element of prior restraint, it is clear that such restraint is constitutionally permissible with respect to obscene publications.

(1)

The cases which have come before the Courts for review with respect to the constitutionality of legislative enactments dealing with matter offensive to public morality have in practically every instance dealt with either (1) the asserted vagueness and indefiniteness of the standard to be applied by the Court or administrative agency charged with enforcement, or (2) the question of whether the offending matter fell within one of the categories proscribed by the statute.

The instant case poses neither of these issues. Judge Fuld in his opinion below refers (R. 80) to the appellants as "not questioning the definiteness of the statutory standard, [and] not challenging the test of obscenity applied by the trial judge"; and, after stating (*ibid.*) that "The paper-covered booklets before us are indisputably pornographic, indisputably obscene and filthy," continues

with the comment that the "Defendants concede as much and also acknowledge, in effect, that, had they been criminally prosecuted for violating the obscenity provisions of the [New York] Penal Law [§ 1141], no constitutional argument could successfully have been leveled against resulting convictions." Judge DESMOND, in the other opinion handed down by the Court of Appeals, states (R. 90) that the "Defendants expressly admit the (obvious) fact that the books which they sold, and the further sale of which has been enjoined, are obscene."

If the question of the definiteness of the statutory standard were open to the appellants in this Court, it is clear that an attack on the statute on that ground would, in any event, be without merit. The standard set up by § 22-a—"obscene, lewd, lascivious, filthy, indecedent or disgusting"—is a valid and adequate one. See the numerous cases cited by Judge DESMOND in support of this proposition (Opinion, R. 91); particularly *Winters* v. *New York*, 333 U. S. 507 (1948), where this Court indicated (at p. 518) that this very language is sufficiently "well understood from long use in the criminal law" to satisfy the due process requirements of definiteness and certainty, and actually (at p. 520) pointed to a legislative provision containing this language as "an example" of a statute wherein "apt words" are used "to describe the prohibited publications." In *Kovacs* v. *Cooper*, 336 U. S. 77 (1949), this Court again (at p. 80) referred to these same words as "examples of permissible standards of statutes for criminal prosecution." See, also, *One, Inc.* v. *Olesen*, —— F. 2d —— (9th Cir., decided Feb. 27, 1957). And on the related question of obscenity as a permissible ground for censorship of motion pictures, see *American Civil Liberties Union* v. *City of Chicago*, 3 Ill. 2d 334, 121 N. E. 2d 585 (1954), *app. dism. for want of a final judgment* 348 U. S. 979 (1955), *s. c. on appeal after remand* —— Ill. App. 2d —— (App. Ct., 1st Dist., decided March 18, 1957).

(2)

Judge FULD notes in his opinion (R. 80-81) that the appellants' "sole attack upon the statute is that the remedy by injunction constitutes an unconstitutional 'prior restraint,' interfering with freedom of speech and press." Judge DESMOND, likewise, states (Opinion, R. 90) of the appellants that "Their sole assertion in this court is that section 22-a is unconstitutional because * * * any and every prior restraint on the publication or sale of obscene literature violates the First Amendment."* And the appellants' brief in this Court (p. 4) similarly limits their challenge of the statute to a claim that it violates due process "in that it is a prior restraint upon publications."

Taking up this sole contention of the appellants, we note initially that, as Judge FULD points out (Opinion, R. 83), "no injunction may issue under section 22-a except after a full trial of the issues, and only upon a finding that the challenged publication is of the same character as would subject the defendant to punishment under the pertinent provisions of the [New York] Penal Law." And, as Judge DESMOND remarks (Opinion, R. 91), "No one claims that section 22-a lacks appropriate procedural protections for those sued under it."

Judge FULD in his opinion subjects the statute to a careful analysis and concludes (R. 86):

> "There is nothing in section 22-a that constitutes or resembles a system of licensing or other threshold approval, which would, for example, operate as a pervasive restraint upon all expression relating to sex problems or behavior and which would ban and suppress, without a censor's imprimatur, any work of literature dealing with those subjects. On the

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* The provision of the statute (subd. 2) directing the Court to render its decision "within two days of the conclusion of the trial" is not before the Court since the parties agreed (R. 40) neither to invoke nor insist upon that requirement. See also opinion of Judge FULD (R. 81, n. 2).

> contrary, the statute makes no attempt to subject writings to the scrutiny and screening of a censor prior to publication. The statutory procedures may be invoked only after publication, and no work may be condemned except upon a formal adjudication of obscenity after a trial conducted in accordance with the essential requirements of due process of law. The mind of the trial judge must be satisfied, from a reading of the challenged writing and a consideration of other pertinent evidence, that it is, indeed, of the type and character condemned by the statute. Moreover, his findings are subject to full appellate review on the facts as well on as the law (Civ. Prac. Act, §584). The procedures thus provided are to be contrasted with the usual features of advance censorship, under which a large measure of discretion is reposed in the censoring official, the procedural safeguards of judicial proceedings are not available, only limited judicial review is allowed and the burden rests on the publisher or vendor to establish the arbitrariness of an adverse ruling (see Emerson, *supra* [The Doctrine of Prior Restraint], 20 Law and Contemporary Problems, at pp. 656-660)."

The contention of counsel for appellants that the statute here under review, despite the considerations noted by Judge FULD, does nonetheless constitute the imposition of a prior restraint, is, we believe, based upon a misinterpretation of the relevant decisions of this Court. Particularly is this true of *Near* v. *Minnesota*, 283 U. S. 697 (1931), which counsel for appellants, throughout his brief (see pp. 10-11, 13-16, 28-29) attempts to liken to the instant case. Actually the two cases present fundamentally different problems.

Basic to determination of the instant case on the issue of prior restraint is the fact that the Court below explicitly *refused* to enjoin the sale and distribution of *future* volumes of "Nights of Horror" on the stated ground (R. 67, 69-70) that (R. 70) "there can be no injunction regarding an unpublished book or pamphlet—however likely it may be thought that it will, when issued, be violative of the statute." In *Near* v. *Minnesota*, *supra* [283

U. S. 697], on the other hand, the very crux of the case was the fact that the statute authorized—and the State court issued—an injunction against *future* publication of the periodical there involved, upon a finding (see at p. 706) that past issues showed that it was "a malicious, scandalous and defamatory newspaper."

Counsel for appellants in the case at bar makes much of the circumstance that the injunction in the *Near* case applied as well to those issues already published, and upon which the finding of a "public nuisance" was based, as to future issues. The opinion in the *Near* case shows, however, that this Court was plainly concerned with the enjoining of future publication (see at pp. 713-715), not the suppression of issues published prior to the issuance of the injunction.

The reason is quite apparent. In *Near*, the appellant in this Court was (see p. 705) the publisher of the weekly periodical there involved, known as The Saturday Press. The prior issues of this periodical were, of course, distributed, on issuance, to subscribers and newspaper vendors. An injunction directed *against the publisher and printer* of the periodical with respect to the prior issues would, accordingly, have so little impact that its validity in that regard would be of no concern either to the parties or to the Court.

In the case at hand, however, the publication in question is not a periodical and the defendants before the Court are not the publishers and printers of the volumes, but the persons and firms holding and offering the published copies for sale to the public. The order providing for seizure and destruction of the copies of "Nights of Horror" in possession of these vendors obviously presents a different problem from the tangential provision of the order in the *Near* case, which, to repeat, was aimed at the suppression of *future* issues.

The *Near* case deserves consideration for another, though related, reason. Counsel for appellants asserts that "The present case is identical with *Near* from the issuance of a temporary injunction to final injunction" (Brief, p. 11; see also at pp. 28-29). The two cases are in fact as dissimilar in regard to the temporary injunction as we have shown them to be with respect to the final injunction. In *Near*, as Chief Justice HUGHES noted (283 U. S., at p. 703), the very statute whose constitutionality was challenged provided that "Upon such evidence as the court shall deem sufficient, a temporary injunction may be granted." The temporary injunction so authorized would enjoin a defendant *pendente lite* from proceeding with the publication and distribution of *future* issues of the periodical involved in the suit. It would, therefore, run afoul of the same constitutional shoals as the later granted permanent injunction

In the case at bar, the statute involved makes no provision at all for a temporary injunction. Such injunction may be sought and granted only, as appellants' counsel recognizes (Brief, p. 29), under a general statute (New York Civil Practice Act, § 877, set forth *post*, p. 22), authorizing the Court in its discretion to enjoin *pendente lite* the commission of acts against which a complaint is directed. See *Hammer* v. *Hammer*, 303 N. Y. 481, 484 (1952).

We do not understand the appellants to contest the validity of this statute. They are, indeed, hardly in a position to attack the injunction *pendente lite* in the instant case on any score since the record shows (R. 39) that it issued "upon consent of the attorney appearing for the parties at that time."

The cases other than *Near* relied on by appellants in respect to prior restraint on publication are likewise not in point. In *Lovell* v. *Griffin*, 303 U. S. 444 (1937), the city ordinance prohibited the distribution of circulars or

literature of any kind within the city limits without first obtaining written permission from the City Manager. The ordinance was held to be (p. 451) "invalid on its face" since it required a license prior to exercise of the right to distribute the religious tracts involved in the case.

The case at bar would be analogous to the *Lovell* case, *supra*, if we were here concerned with a statute which required book sellers to procure a license from a city official before engaging in that occupation. The statute now before the Court imposes no requirement of license or permit, and the *Lovell* case is, therefore, not apposite. It may be observed incidentally that Chief Justice *Hughes* in the course of his opinion in the *Lovell* case (see 303 U. S., at p. 451) intimated that the result might have been different had the ordinance been limited to writings that were "obscene or offensive to public morals".

In *Cantwell* v. *Connecticut*, 310 U. S. 296 (1940), also relied on by appellants (Brief, pp. 20-23), this Court held that a State may not require the procuring of a certificate from a designated official as a condition to soliciting support for a religious cause. It held further (pp. 305-306) that it was no answer for the State to say that the defendants might have recourse to Court action to enforce their right to the required certificate. The State could not, in other words, compel a person to seek a judicial mandate before exercising his constitutional right to distribute religious publications or other writings within the constitutional protection.

In the case at bar there is neither administrative nor judicial prior restraint upon the constitutional right. There is here no requirement of license, permit or certificate. What we do have is unrestrained publication, distribution to book sellers and proof of sale by them of the challenged writings. It is clear, therefore, that the subsequent judicial proceedings and injunction order are no more than a sanction additional to that prescribed by the criminal law for *past* activity.

Since, as Judge FULD points out (Opinion, R. 80), the defendants "acknowledge in effect, that, had they been criminally prosecuted for violating obscenity provisions of the Penal Law, no constitutional argument could successfully have been leveled against resulting convictions", we find it difficult to follow the reasoning of appellants' counsel. Surely a State has the right to restrain the further commission of acts judicially determined to be of a criminal character and injurious to the public welfare. See *Eilenbecker* v. *District Court of Plymouth County*, 134 U. S. 31, 40 (1890); cf. *Lawton* v. *Steele*, 152 U. S. 133, 136 (1894).

Other cases cited by appellants (Brief, pp. 23-24) require little comment. In *Schneider* v. *State* (*Town of Irvington*), 308 U. S. 147 (1939), and in *Largent* v. *Texas*, 318 U. S. 418 (1943), this Court struck down municipal ordinances which either flatly prohibited the distribution of literature on the public streets or required a permit as a condition to such distribution. And in *Niemotko* v. *Maryland*, 340 U. S. 268 (1951), and *Kunz* v. *New York*, 340 U. S. 290 (1951), the Court reached the same conclusion with respect to similar ordinances relating to the right to speak in a public park or street. All these cases plainly fell within the scope of the holding of this Court in *Lovell* v. *Griffin*, *supra* [303 U. S. 444], which we have already discussed. The *Lovell* case was applied, too, in *Saia* v. *New York*, 334 U. S. 558 (1948), dealing with a city ordinance forbidding the use of sound amplification devices in public places except with the permission of the Chief of Police.

In *Kovacs* v. *Cooper*, *supra* [336 U. S. 77], this Court upheld a city ordinance forbidding use or operation on the public streets of a sound truck which emits "loud and raucous noises," which the Court viewed (pp. 83, 87) as merely regulating and not prohibiting the exercise of freedom of speech. The Court said (p. 83) that "disturb-

ing noises" were "nuisances well within the municipality's power to control" and continued with these words which, we believe, are equally applicable to the case at bar (p. 83):

> "The police power of a state extends beyond health, morals and safety, and comprehends the duty, within constitutional limitations, to protect the well-being and tranquility of a community. *A state or city may prohibit acts or things reasonably thought to bring evil or harm to its people.*" (Italics ours.)

What is "reasonably thought to bring evil or harm to its people" is a matter peculiarly within the province of the State's legislative body. As Judge FULD points out (Opinion, R. 82-83), the New York Legislature apparently concluded that the criminal sanctions imposed upon the sale of obscene material "were inadequate to stem the rising tide of obscene and pornographic publications that have, in recent years, flooded the book and periodical market, and the supplemental remedy of an equity action for an injunction was thereupon devised. (Cf. Report of New York State Joint Legislative Committee to Study the Publication of Comics, N. Y. Legis. Doc., 1954, No. 37, pp. 31-32.)" It is significant, too, as also noted by Judge FULD (Opinion, R. 82), that statutes similar to New York Penal Law, § 1141, "are in effect in almost all of the other jurisdictions in this country (see Note, 22 U. of Chicago L. Rev. 216)."

(3)

We submit, finally, that, even were there an element of prior restraint in the case, there would still be no basis for an attack on the constitutionality of the statute. There is, as Judge DESMOND points out (Opinion, R. 90-91), "most ample authority that the First Amendment does not protect obscene books against prior restraint (*Chaplinsky* v. *New Hampshire*, 315 U. S. 568, 572; *Near* v. *Minnesota*, 283 U. S. 697, 716; *Joseph Burstyn, Inc.* v. *Wilson*,

343 U. S. 495, 502-504; see *Beauharnais* v. *Illinois*, 343 U. S. 250, 266; *Ex parte Jackson*, 96 U. S. 727, and *Hannegan* v. *Esquire, Inc.*, 327 U. S. 146)." To which we might add the words of this Court in *Lawton* v. *Steele, supra* [152 U. S. 133], (at pp. 136-137):

> "The extent and limits of what is known as the police power have been a fruitful subject of discussion in the appellate courts of nearly every State in the Union. It is universally conceded to include everything essential to the public safety, health and morals, and to justify the destruction or abatement, by summary proceedings, of whatever may be regarded a public nuisance. Under this power it has been held that *the State may order* * * * *the suppression of obscene publications* and houses of ill fame * * *. Beyond this, however, the State may interfere wherever the public interests demand it, and in this particular a large discretion is necessarily vested in the legislature to determine, not only what the interests of the public require, but what measures are necessary for the protection of such interests." (Italics ours.)

Certainly Congress has indicated in the Federal field that it has no qualms with respect to "prior restraint" of obscene publications. Thus, as noted by Judge FULD (Opinion, R. 88-89), the Federal Tariff Act (46 Stat. 688 [1930], 19 U.S.C. § 1305) provides for the seizure by the Customs Collector of any obscene matter imported into this country and authorizes the United States District Court to direct the forfeiture, confiscation and destruction of such matter upon adjudication after trial that it is obscene. These provisions have uniformly been held or assumed to be constitutional. See *Besig* v. *United States*, 208 F. 2d 142 (9th Cir., 1953); *Parmelee* v. *United States*, 113 F. 2d 729 (D. C. Cir., 1940); *United States* v. *One Book Called Ulysses*, 72 F. 2d 705 (2d Cir., 1934); *United States* v. *One Obscene Book Entitled "Married Love"*, 48 F. 2d 821 (D. C., S.D.N.Y., 1931); *United States* v. *One Unbound Volume of Prints*, 128 F. Supp. 280 (D. C., Md., 1955).

Similarly, Congress has provided that obscene publications are unmailable (35 Stat. 1429 [1909] as amended, 18 U.S.C. § 1461]; and that they may not be deposited with any express company or other common carrier for transportation in interstate or foreign commerce (35 Stat. 1138 [1909] as amended, 18 U.S.C. § 1462. This Court has said of these statutes that their validity "is recognition that the mails may not be used to satisfy all tastes, no matter how perverted." *Hannegan* v. *Esquire, Inc., supra* [327 U. S. 146], at p. 158. And see *Summerfield* v. *Sunshine Book Company,* 221 F. 2d 42 (D. C. Cir., 1955), *cert. den.* 349 U. S. 921 (1955); *Sunshine Book Co.* v. *Summerfield,* 128 F. Supp. 564 (D.C., D.C., 1955) [appeal pending].

CONCLUSION

The judgment appealed from should be affirmed.

April 3, 1957.

Respectfully submitted,

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APPENDIX

Section 22-a of the New York Code of Criminal Procedure

Section 22-a of the New York Code of Criminal Procedure (L. 1941, ch. 925), as amended by L. 1954, ch. 702, effective July 1, 1954, reads as follows:

"§ 22-a. **Obscene prints and articles; jurisdiction.**

The supreme court has jurisdiction to enjoin the sale or distribution of obscene prints and articles, as hereinafter specified:

1. The chief executive officer of any city, town or village or the corporation counsel, or if there be none, the chief legal officer of any city, town, or village, in which a person, firm or corporation sells or distributes or is about to sell or distribute or has in his possession with intent to sell or distribute or is about to acquire possession with intent to sell or distribute any book, magazine, pamphlet, comic book, story paper, writing, paper, picture, drawing, photograph, figure, image or any written or printed matter of an indecent character, which is obscene, lewd, lascivious, filthy, indecent or disgusting, or which contains an article or instrument of indecent or immoral use or purports to be for indecent or immoral use or purpose; or in any other respect defined in section eleven hundred forty-one of the penal law, may maintain an action for an injunction against such person, firm or corporation in the supreme court to prevent the sale or further sale or the distribution or further distribution or the acquisition or possession of any book, magazine, pamphlet, comic book, story paper, writing, paper, picture, drawing, photograph, figure or image or any written or printed matter of an indecent character, herein described or described in section eleven hundred forty-one of the penal law.

2. The person, firm or corporation sought to be enjoined shall be entitled to a trial of the issues within one day after joinder of issue and a decision shall be rendered by the court within two days of the conclusion of the trial.

3. In the event that a final order or judgment of injunction be entered in favor of such officer of the city, town or village and against the person, firm or corporation sought to be enjoined, such final order of judgment shall contain a provision directing the person, firm or corporation to surrender to the sheriff of the county in which the action was brought any of the matter described in paragraph one hereof and such sheriff shall be directed to seize and destroy the same.

4. In any action brought as herein provided such officer of the city, town or village shall not be required to file any undertaking before the issuance of an injunction order provided for in paragraph two hereof, shall not be liable for costs and shall not be liable for damages sustained by reason of the injunction order in cases where judgment is rendered in favor of the person, firm or corporation sought to be enjoined.

5. Every person, firm or corporation who sells, distributes, or acquires possession with intent to sell or distribute any of the matter described in paragraph one hereof, after the service upon him of a summons and complaint in an action brought by such officer of any city, town or village pursuant to this section is chargeable with knowledge of the contents thereof."

Cited Provisions of the New York Civil Practice Act

"§ 588. **Appeal as of right.** Appeal to the court of appeals lies only

* * * * *

4. from a judgment of a court of record of original jurisdiction which finally determines an action, or an order of such court which finally determines a special proceeding, where the only question involved on the appeal is the validity of a statutory provision of the state or of the United States under the constitution of the state or the United States; and on any such appeal only the constitutional question shall be considered and determined by the court."

"§ 877. **Injunction, when the right thereto depends upon the nature of the action.**

Where it appears from the complaint that the plaintiff demands and is entitled to a judgment against the defendant restraining the commission or continuance of an act, the commission or continuance of which during the pendency of the action would produce injury to the plaintiff, an injunction order may be granted to restrain it. The case provided for in this section is described in this act as a case where the right to an injunction depends upon the nature of the action."